MOTION FILED
JAN 30 1981

No. 80-317

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE UNIVERSITY OF TEXAS, *et al.*,

Petitioners,

—v.—

WALTER CAMENISCH,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE CHILDREN'S RIGHTS PROJECT, THE NEW YORK CIVIL LIBERTIES UNION, THE AMERICAN COUNCIL OF THE BLIND, AND THE CENTER FOR LAW AND EDUCATION, *AMICI CURIAE*

Of Counsel:

PATRICIA E. HENNESSEY
CHARLES S. SIMS
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
KATHLEEN MEGIVERN
American Council of the Blind
1211 Connecticut Ave., N.W.
Suite 506
Washington, D.C. 20036
DIANA C. PULLIN
Center for Law and Education
6 Appian Way
Cambridge, MA 02138

GEORGE KANNAR
MARCIA ROBINSON LOWRY
(Counsel of Record)
American Civil Liberties Union Foundation
Children's Rights Project
132 West 43rd Street
New York, New York 10036
(212) 944-9800

ROBERT LEVY
New York Civil Liberties Foundation
84 Fifth Avenue
New York, New York 10011
(212) 924-7800

Attorneys for Amici Curiae

MOTION FOR LEAVE TO FILE

The American Civil Liberties Union, its Children's Rights Project, The New York Civil Liberties Union, The American Council for the Blind, and the Center for Law and Education, hereby respectfully move for leave to file the attached brief amici curiae. The consent of the attorney for respondent has been obtained. The consent of the attorney for petitioner was requested but refused.

The American Civil Liberties Union is a nationwide, non-partisan organization of over two hundred thousand members, dedicated to defending the principles embodied in the Bill of Rights. The Children's Rights Project is a special project of the ACLU dedicated to asserting and defending the rights of children. The

New York Civil Liberties Union is a state affiliate of the ACLU, operated in New York State.

The ACLU and its affiliates and the Children's Rights Project have a deep interest in protecting the Constitutional and statutory rights of handicapped individuals, including rights secured by the Rehabilitation Act of 1973, 29 U.S.C. 790, et seq. In the belief that judicial involvement is necessary to secure the rights of handicapped individuals, the ACLU has represented the plaintiffs in O'Connor v. Donaldson, 422 U.S. 563 (1975), the Willowbrook case, NYSARC v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975), and petitioner in Trageser v. Libbie Convalescent Home, cert. denied, 442 U.S. 947 (1979).

The American Council of the Blind is a nationwide membership organization with sixty-one state and national affiliates. The majority of the Council members are blind and visually impaired persons, who as a class will be directly affected by the outcome of this important case. The Center for Law & Education is the national support center on education issues for legal services programs and is funded and staffed specifically to assist and participate in litigating education cases. The Center has served as counsel in a broad range of education cases, including cases challenging discrimination in schools on the basis of race, handicap, and denial of other student rights.

Because this case raises important questions concerning the implementation

of rights secured by the Constitution and the Rehabilitation Act, amici respectfully urge this Court to accept and file the enclosed brief amici curiae.

Respectfully submitted,

Marcia Robinson Lowry

MARCIA ROBINSON LOWRY
American Civil Liberties Union
Children's Rights Project
132 West 43rd Street
New York, New York 10036

Attorney for Amici Curiae

January 27, 1981

TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE..... i

TABLE OF AUTHORITIES.....viii

INTEREST OF AMICI..... 1

STATEMENT OF THE CASE..... 1

SUMMARY OF ARGUMENT..... 4

ARGUMENT..... 7

I. SECTION 504 OF THE REHABILITATION ACT OF 1973 MAY BE ENFORCED BY A PRIVATE RIGHT OF ACTION..... 7

A. Congress Intended That Section 504 Rights Be Enforced By Private Actions..... 8

B. This Court's Decision in Cannon v. University of Chicago Confirms the Existence of a Private Right of Action..... 13

Page

II. THE COURT OF APPEALS CORRECTLY CONSTRUED THIS COURT'S DECISION IN SOUTHEASTERN COMMUNITY COLLEGE v. DAVIS, THE STATUTE, AND THE RELEVANT REGULATION, IN ORDERING THE UNIVERSITY OF TEXAS TO PROVIDE A SIGN INTERPRETER..... 18

A. The Court of Appeals Correctly Construed This Court's Decision in Southeastern Community College v. Davis..... 21

B. Valid HEW Regulations Require the University of Texas to Provide an Interpreter..... 24

III. PLAINTIFF HAS MET THE MODEST BURDEN SECTION 504 IMPOSES ON PLAINTIFFS OF SHOWING THAT THE UNIVERSITY'S PROGRAMS RECEIVE FEDERAL FUNDS..... 37

A. A Handicapped Student Suing a University Need Prove Only That The University Is A Recipient Of Federal Funds In Order To State A Claim Under Section 504..... 38

Page

B. The Stipulated Facts Concerning Federal Funding Suffice For Granting Camenisch The Relief Requested and This Court Should Not Hold Otherwise Without First Remanding The Case For Development Of A Factual Record..... 47

C. If Evidence Concerning A Particular "Program of Activity" Were Required Under Section 504, Ordinary Principles of Common Law Would Place The Burden of Coming Forward With Such Evidence Upon Defendants, Not Plaintiffs..... 52

CONCLUSION..... 55

TABLE OF AUTHORITIES

Cases	Page
Adashunas v. Levy, 626 F.2d 600 (7th Cir. 1980)	17
Atchison, T. & S.F.R. Co. v. Scarlett, 300 U.S. 471 (1937)	31
Bartels v. Biernat, 427 F.Supp. 226 (E.D. Wisc. 1977)	36
Batterton v. Francis, 432 U.S. 416	31
Board of Public Institutions of Taylor County, Florida v. Finch, 414 F.2d 1068 (5th Cir. 1969)	44
Bob James University v. Johnson, 396 F.Supp. 597 (D.S.C. 1974), aff'd mem. 529 F.2d. 514 (4th Cir. 1975)	39,42
Bossier Parish School Board v. Leman, 370 F.2d 847, 852 (5th Cir.), Cert. denied, 388 U.S. 911 (1967)	9,36
Camenisch v. University of Texas, [1978] 16 EPD (CCH) ¶8836 (W.D. Tex. May 17, 1978)	28
Cannon v. University of Chicago, 441 U.S. 677 (1979)	4,8, 10,13, 14,16, 17

Page

Cases (cont'd)

Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 762 (8th Cir.), cert. den, ___ U.S. ___, 101 S.Ct. 249 (1980). 43

Castaneda v. Partida, 430 U.S. 482 (1977) 53

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) 31

Codd v. Velger, 429 U.S. 624 (1977). 50

Cort v. Ash, 422 U.S. 66 (1975). . . 8

Davis v. Southeastern Community College, 574 F.2d 1158 (4th Cir. 1978), rev'd on other grounds, 442 U.S. 397 (1979). 17

Dennis v. United States, 339 U.S. 162 (1950) 34

Foti v. Immigration and Naturalization Serv., 375 U.S. 217 (1963). . 31

Griffin v. Illinois, 351 U.S. 12 (1956). 35

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 6,31 34

Grove City College v. Harris, Civ. No. 78-1293 (W.D. Pa. March, 1980 39

Page

Cases (cont'd)

Hairston v. Drosick, 423 F.Supp. 180 (S.D.W.Va. 1976) 36

Hills v. Gautreaux, 425 U.S. 286 (1976) 36

Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977) 16

Keyes v. School District No. 1, 413 U.S. 189 (1973). 53

Lau v. Nichols, 414 U.S. 563 (1974). 5,6, 16,17, 33,36

Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977) 16

Lloyd v. Illinois Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977) 17,33, 36

Maine v. Thiboutot, 100 S.Ct. 2502 (1980) 18

National Association for the Advancement of Colored People v. The Medical Center, Inc., 599 F.2d 1247 (3d Cir. 1979). 16

Page

Cases (cont'd)

Natonabah v. Board of Education, 355 F.Supp. 716 (D.N.M. 1973). . . 9

NLRB v. Great Dane Trailers, 388 U.S. 26 (1967) 53

NYSARC v. Carey, 393 F.Supp. 715 (E.D.N.Y. 1975). ii

O'Connor v. Donaldson, 422 U.S. 563 (1975) ii

Red Lion Broadcasting Co. v. FTC, 395 U.S. 367 (1969). 10

Southeastern Community College v. Davis, 442 U.S. 397 (1979) 5,6, 13,18 19,20, 21,23 24,29 32,41, 43

Southeastern Community College v. Davis, No. 78-711. 10

Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1978), cert. den., 442 U.S. 947 (1979) ii,42, 43

Udall v. Tallman, 380 U.S. 1 (1965). 31

Page

Cases (cont'd)

United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977). 17,36

United States v. Baltimore County, 19 FEP ¶403 (D. Md. Dec. 1, 1978). 46

United States v. Caceres, 440 U.S. 741. 52

United States v. Mersky, 361 U.S. 431 (1960) 31

University of California v. Bakke, 438 U.S. 265 (1978). 5

Statutes

Pub. L. 95-1149. 12

Rehabilitation Act of 1973, §504 (29 U.S.C. §794) 1,5,7, 8,9,10, 11,15, 20,21, 37,38 39,40, 46,47, 48,49, 50,51, 52,56

Rehabilitation Act of 1973, §505a, (29 U.S.C. §794a) 12

Page

Statutes (cont'd)

29 U.S.C. §775(a)(1) 36

31 U.S.C. §1242(a) 44

42 U.S.C. §1983. 17

42 U.S.C. §2000d 14

Regulations

31 C.F.R. §51.51(i)(1979), reprinted in 2 Empl. Prac. Guide (CCH) ¶4855.51 45

31 C.F.R. §57.51(7). 45

34 C.R.F. Part 104 . . . . . 13,25, 26,41

45 C.F.R. Part 84. 51

Legislative Histories

S. Rep. 93-318, 93rd Cong., 1st Sess., reprinted in 1973 U.S. Code Cong. & Adm. News 2076, 2092 . . . 7

S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39-40, reprinted in 1974 U.S. Code Cong. & Adm. News 6373 . 11,29

Page

Other Authorities

41 Fed. Reg. 20296 (May 17, 1976). . 30

41 Fed. Reg. 29549 (1976). 30

Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan. L. Rev. 5 (1959). 53

McBaine, Burden of Proof: Degrees of Belief, 32 Cal. L. Rev. 242 (1944) 54

Underwood, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases, 86 Yale L. J. 1299 (1977). 54

INTEREST OF AMICI

The Interest of Amici is set forth in the foregoing motion.

STATEMENT OF THE CASE

This case involves the refusal of the University of Texas at Austin, a state university supported by more than $30,000,000 in federal funds, to make any accommodation whatever to meet the needs of Walter Camenisch, a deaf graduate student, who could not participate in his classes or obtain the job he had been promised by the Texas School for the Deaf upon completion of his degree without the assistance at the University of a sign interpreter, or transcribed lectures, or other special aid. Camenisch contends that Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and the regulations lawfully

promulgated by the Department of Health, Education and Welfare pursuant thereto require the University to provide such services. The District Court agreed and, because the University refused to suggest any less expensive or more administratively convenient means to provide Camenisch with access to his classes, ordered the University to provide Camenisch with a part-time sign interpreter, at a total cost of approximately $1,200.[1] The Fifth Circuit upheld that ruling.

Few facts in this case are in dispute, but some deserve special emphasis. The

---

[1] The actual cost does not appear in the record, but we are advised by counsel that the University, which provided the services as ordered under a $3,000 bond, actually spent a little more than a third of the bonded amount.

University of Texas has stipulated that it received at least $31,400,000 of federal financial assistance, 15.5% of its annual budget, during the year Camenisch requested the University to comply with HEW Regulations. Moreover, the University of Texas stipulated that Camenisch is, within the meaning of § 504, a qualified handicapped person. While he was in the University's graduate school, Camenisch was also employed as acting dean at the Texas School for the Deaf, and his continued employment was contingent upon his securing a Master's Degree.

Prior to the District Court's decision, the Department of Health, Education and Welfare issued a letter of findings supporting Camenisch and rejecting each of the University's

arguments for refusing to provide the auxiliary aids Camenisch needs and the applicable federal regulations require. The agency's findings were wholly in accord with the Assurance of Compliance the University had earlier signed with HEW in which it promised to comply -- in all its programs and activities -- with § 504 and the regulations lawfully promulgated thereunder.

SUMMARY OF ARGUMENT

The legislative history of the Rehabilitation Act demonstrates that Congress intended to permit handicapped persons to sue to enforce rights guaranteed in § 504 of the Rehabilitation Act, a conclusion amply supported by this Court's decisions in Cannon v. University of Chicago, 441 U.S. 677 (1979), University

of California v. Bakke, 438 U.S. 265 (1978), and Lau v. Nichols, 414 U.S. 563 (1974). Point I.

The decision reached by both courts below did not unlawfully require the University to extend affirmative action to the handicapped. Instead, following this Court's teaching in Southeastern Community College v. Davis, 442 U.S. 397 (1979), the district court found, and the Court of Appeals agreed, that the University had discriminated against respondent by its unjustified refusal to make its oral instruction available to him in contravention of § 504 and valid HEW regulations. The relief ordered and affirmed was properly non-intrusive, and fully consistent with those regulations. The holding that identical treatment was in these circumstances discriminatory within the meaning of the Rehabilita-

tion Act is fully supported by cases in this Court. See, e.g., Lau v. Nichols, supra; Griggs v. Duke Power Co., 401 U.S. 424 (1971). Point II.

The question whether respondent met his burden of showing that § 504 applied to the University in this case is not before the Court, since petitioner failed to raise the point below. In any event, § 504 imposes no burden on plaintiffs of demonstrating "program specificity," as every court to reach the question has agreed, and as the decision in Southeastern Community College indicates. Moreover, even were this Court to doubt that this is so, the University's failure to make a record on the issue, or even to assert that the undefined "program" respondent completed was not federally funded, counsels against reversal of the Court

of Appeals on this issue, and suggests at most a remand for development of the record. If the case is remanded for this purpose, the Court should make clear, in accordance with ordinary principles of common law, that the University, which alone has access to the information in question, carries the burden of demonstrating that the relevant program is not federally funded. Point III.

ARGUMENT

I. SECTION 504 OF THE REHABILITATION ACT OF 1973 MAY BE ENFORCED BY A PRIVATE RIGHT OF ACTION.

By enacting the Rehabilitation Act of 1973, Congress intended to make "participation in society more feasible for handicapped individuals." S. Rep. 93-318, 93rd Cong., 1st Sess., reprinted in 1973 U.S. Code Cong. & Adm. News

2076, 2092. Virtually every federal court to consider the question presented here has concluded that a private right of action on behalf of handicapped individuals against those who have discriminated on the basis of handicap is necessary, proper "and intended" under § 504 of the Rehabilitation Act. That conclusion, endorsed by the Fifth Circuit in this case, 616 F.2d at 131, is entirely consistent with the reasoning of this Court's decisions in Cannon v. University of Chicago, 441 U.S. 677 (1979) and Cort v. Ash, 422 U.S. 66 (1975), where the standards for implying private rights of action were set forth.

A. Congress Intended That Section 504 Rights Be Enforced by Private Actions.

The Rehabilitation Act, as enacted in 1973, read in relevant part as follows:

> "No otherwise qualified handicapped individual in the United States, as defined in section 706(6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

29 U.S.C. § 794.

Although the original act contained no express grant of a private cause of action, in framing the language of § 504, Congress chose precisely the same words as Title VI of the Civil Rights Act, which, as Congress was well aware in 1973, had already been repeatedly held to confer a private right of action upon aggrieved individuals.[2] Legislative

---

[2] The lower federal courts have agreed that a private right of action should be implied under Title VI. See, e.g., Bossier Parish School Board v. Leman, 370 F.2d 847, 852 (5th Cir.), cert. denied, 388 U.S. 911 (1967); Natonabah v.

history accompanying the Act made clear that Congress intended a private right of action under § 504.[3]

Moreover, in twice amending the original Rehabilitation Act, in 1974 and 1978, Congress twice reiterated and clarified its intention to create a private right of action under § 504. The 1974 and 1978 Amendments should be accorded great weight when interpreting Congressional intent. See Red Lion Broadcasting Co. v. FTC, 395 U.S. 367, 380-81 (1969).

Board of Education, 355 F. Supp. 716, 724 (D.N.M. 1973). This Court has held specifically that Congress was aware of the many cases concerning private causes of action under Title VI as of 1972, that is, a year before the enactment of § 504. Cannon v. University of Chicago, supra at 575-76.

[3] See generally Brief for the American Civil Liberties Union et al. Amici Curiae in Southeastern Community College v. Davis, No. 78-711, at 6-15.

Congress first amended the Rehabilitation Act in 1974. The committee report to the Senate concerning that amendment states:

> This approach to implementation of Section 504, which closely follows [Title VI] would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal Government as well as relative ease of implementation and permit a judicial remedy through a private action. (Emphasis supplied).

S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39-40, reprinted in 1974 U.S. Code Cong. & Admin. News 6373, 6391.[4]

---

[4] Congress was especially concerned about advancing educational opportunities for handicapped people. The Senate Labor and Public Welfare Committee stated in its Report:

> Special attention must be paid to the needs of those individuals who through no fault of their own have not received adequate education. These individuals, young adults and adults alike, must be afforded equal opportunity and access to higher educational services. The

By 1978, the year Walter Camenisch brought this case, when Congress again amended the Act, the issue of the existence of a private right of action was thought to be so well settled that the only open question was whether private litigants were entitled to attorneys' fees in § 504 cases. Congress again voted to treat § 504 the same as other civil rights statutes, and provided for the award of attorneys fees, Section 505a, 29 U.S.C. § 794a, action which is inexplicable except on the understanding that Congress had previously created a private right of action. Moreover, § 794a(a)(2), which was added in the 1978 amendments, Pub. L. 95-1149, now expressly provides:

> Committee is aware that at the present time most of these avenues are not open to individuals with handicaps. . . .

S. Rep. No. 1297, 93d Cong. 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News at 6408 (emphasis added).

> "The remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal Assistance or Federal provider of such assistance under Section 794 of this title."

The regulations promulgated by HEW to implement § 504 are similarly explicit. Under 34 C.F.R. § 104.61, "The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 apply to this part."

B. This Court's Decision in Cannon v. University of Chicago Confirms the Existence of a Private Right of Action.

Despite the fact that in Southeastern Community College v. Davis, 442 U.S. 397, 404 n.5 (1979), this Court formally reserved the question whether § 504 provides a private right of action, the Court's decision in Cannon v. University of Chicago,

441 U.S. 677 (1979), effectively put to rest any lingering doubt as to the existence of a private cause of action under § 504.

In Cannon, the Court noted the near identity between Title IX, the act it was considering, and Title VI,[5] the similarities in the provisions for the administrative resolution of disputes between the two titles, the fact that the intention of the legislative scheme was "to avoid the use of federal resources to support discriminatory practices . . . [and] . . . to provide individual citizens effective protection against those practices," and

---

[5] Section 601, 42 U.S.C. § 2000d, which provides:

> "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

the fact that the federal government has been the primary guarantor of individuals against all forms of discrimination since at least the Civil War. The Court also noted that Congress was charged with knowledge of earlier judicial decisions implying a private cause of action under Title VI at the time it enacted Title IX. On the basis of these considerations -- all of which apply with at least equal force to § 504 -- the Supreme Court implied a private cause of action under Title IX.

In Cannon, this Court clearly indicated its preference for Congress to speak explicitly when it wishes to create a private cause of action,but it also made clear that

> the failure of Congress to do so is not inconsistent with an intent on its part to have such a remedy

available to the person benefitted by its legislation.

441 U.S. at 717. As demonstrated above, the intentions of Congress concerning § 504, particularly those articulated at the time of the 1978 Amendments, are even clearer than its intentions concerning Title IX. Therefore, Cannon decides this issue a fortiori.[6]

---

[6] See also Lau v. Nichols, 414 U.S. 563 (1974) where this court recognized a private action under Title VI and permitted private persons to challenge the failure of the San Francisco School District to offer classes in the Chinese language to Chinese speaking children. In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), four Justices of this Court found an implied right of action under Title VI; four others assumed it for purposes of that case. The Courts of Appeal have unanimously agreed that the Rehabilitation Act creates a private cause of action. See Kampmeier v. Nyquist, 553 F.2d 296, 299 (2d Cir. 1977); Leary v. Crapsey, 566 F.2d 863, 865 (2d Cir. 1977); National Association for the Advancement of Colored People v. The Medical Center, Inc., 599 F.2d 1247, 1258-59 (3d Cir. 1979); Davis v. Southeastern Community College, 574 F.2d

In sum, the Congressional intent to provide a private right of action for handicapped persons under Section 504 is clear, and the Fifth Circuit's decision is in complete harmony with this Court's prior decisions in Cannon v. University of Chicago, supra, and Lau v. Nichols, supra, which recognized private rights of action under Title IX and Title VI, the intended analogs of Section 504.[7]

1158, 1159 (4th Cir. 1978), rev'd on other grounds, 442 U.S. 397 (1979); Lloyd v. Illinois Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977); Adashunas v. Levy, 626 F.2d 600, 603 (7th Cir. 1980); United Handicapped Federation v. Andre, 558 F.2d 413, 415 (8th Cir. 1977).

7 Even if this Court held that Section 504 creates no private right of action, Camenisch could bring his claim in district court under 42 U.S.C. § 1983 against a state public educational institution to redress an alleged deprivation of the rights, privileges, and immunities secured by the laws of

II. THE COURT OF APPEALS CORRECTLY CONSTRUED THIS COURT'S DECISION IN SOUTHEASTERN COMMUNITY COLLEGE v. DAVIS, THE STATUTE, AND THE RELEVANT REGULATION, IN ORDERING THE UNIVERSITY OF TEXAS TO PROVIDE A SIGN INTERPRETER

The District Court's order in this case, affirmed by the Circuit Court, is unequivocally among the numerous possible remedies for deprivation of a deaf student's access to academic classes contemplated by regulations implementing the rights

---

the United States. In Maine v. Thiboutot, ____ U.S. ____, 100 S.Ct. 2502 (1980), this Court held that § 1983 entitles an individual to bring suit for violations of federal statutes, such as Section 504, a question which had been reserved in Southeastern Community College v. Davis, 442 U.S. 397, 404 n.5 (1979).

In his dissenting opinion in Thiboutot, Justice Powell argued that § 1983 only encompasses civil rights statutes, not all statutory claims. Even under this narrower interpretation, Mr. Camenisch could sue under § 1983, because Section 504 is a civil rights statute.

granted in Section 504. In its brief and certiorari petition to this Court, the University of Texas has attempted to mislead the Court by arguing that the Fifth Circuit incorrectly applied Southeastern Community College v. Davis, and to further confuse the issue by erroneously equating "affirmative action" with the steps necessary to ensure equality of treatment for handicapped persons. This case, however, is not about affirmative action but rather the finding of two courts below that the University discriminated against respondent by its unjustified refusal to extend the reasonable accommodation required by HEW regulations to effect the equality for qualified handicapped persons in higher education which it

was Congress' clear intention to insure.[8]

---

[8] The Rehabilitation Act provides both that "no otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in" a covered program, and that no such individual "shall, solely by reason of his handicap, . . . be subjected to discrimination under" any covered program. 29 U.S.C. § 794, quoted supra at 9. The Court has not previously decided whether there is any difference in coverage between those prohibitions, although Southeastern Community College might be read to indicate that there is not. See 442 U.S. at 400, 412. In any event, because Camenisch has been "discriminated against" within the meaning of Southeastern Community College, we have addressed this brief solely to that test, even though it is clear that he has also been "excluded from participation" in covered programs as well.

A. The Court of Appeals Correctly Construed This Court's Decision in Southeastern Community College v. Davis

The University of Texas mischaracterizes the issue in this case by asserting that the courts below failed to heed this Court's decision in Southeastern Community College v. Davis. The Fifth Circuit did not misconstrue this Court's decision in Davis, however, but correctly distinguished the instant case by applying the analysis undertaken in Davis.

In Southeastern Community College, this Court held that Mrs. Davis failed to meet the legitimate and necessary physical requirements of the college's nursing program, and hence was not an "otherwise qualified handicapped individual" within the meaning of Section 504. 442 U.S. at 407. This Court further found that none

of the modifications and auxiliary aids authorized by the HEW regulations could accommodate Mrs. Davis's handicap to enable her to participate in the program and become a registered nurse. 442 U.S. at 409.

By stark contrast, both courts below found -- and even the University of Texas has stipulated -- that Walter Camenisch is an otherwise qualified handicapped student, within the meaning of § 504, who despite his handicap could both participate successfully in his classroom activities with an interpreter or other educational aid, and perform well in a job as Dean of Students at the Texas School for the Deaf that his degree would guarantee.

Because Mrs. Davis did not meet the threshold requirement of being an "otherwise qualified handicapped" person

within the meaning of Section 504, this Court did not, and could not, decide in that case the degree of accommodation Section 504 requires for persons like Mr. Camenisch, who is within the scope of the Act. The Fifth Circuit's holding that the University of Texas was obligated to provide a sign language interpreter was not inconsistent with this Court's holding in Davis, and was squarely based on the duly promulgated HEW Regulations pursuant to § 504. As Davis expressly recognized,

> "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. . . .
>
> identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsiblity of HEW." 442 U.S. at 412-13.

The relief requested in Davis involved major restructuring of the clinical portion of an academic program. No such restructuring is necessary here, and affording Camenisch the accommodation would not change the program as it affected other students in any respect. Camenisch could participate in the graduate program as given, if a sign language interpreter or other educational aid were provided to give him access to classroom lectures.

B. Valid HEW Regulations Require the University of Texas to Provide an Interpreter.

The regulations at issue in this case were duly authorized by the Rehabilitation Act, and promulgated by the Department of Health, Education and Welfare. They are explicit and unequivocal

in their requirement that colleges and universities are obliged to make oral lectures available to deaf students. 34 C.F.R. § 104.44(d) provides, under the title "Auxiliary Aids," that

> (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.
>
> (2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually

> prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

Moreover, in addition to the clear meaning of the regulations themselves, recipient institutions are guided by "Comments" explaining the regulations under which this case was decided. At 34 C.F.R. § 104, Appendix A, HEW reiterated that one method for complying with 34 C.F.R. § 104.44(d) was provision of interpreters for deaf students.[9] The

---

[9] In discussing and recommending ways which colleges and universities such as the University of Texas could defray the cost of providing interpreters, the regulations clearly established a duty of the university:

> Under § 104.44(d), a recipient must ensure that no handicapped student is subject to discrimination in the recipient's program because of the absence of necessary auxiliary educational aids. Colleges and universities expressed concern

preliminary relief ordered by the district court in this case mirrored these regulations, by requiring the University of Texas

---

about the costs of compliance with this provision.

The Department emphasizes that recipients can usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges or universities. In those circumstances where the recipient institution must provide the educational auxiliary aid, the institution has flexibility in choosing the methods by which the aids will be supplied. For example, some universities have used students to work with the institution's handicapped students. Other institutions have used existing private agencies that tape texts for handicapped students free of charge in order to reduce the number of readers needed for visually impaired students.

> "to procure an interpreter or other effective method of making orally delivered course materials available to Plaintiff. . . ."

Camenisch v. University of Texas, [1978] 16 EPD (CCH) ¶ 8836 (W.D. Tex. May 17, 1978) (emphasis added). In short there can be no question that the relief ordered and affirmed in this case is precisely the relief contemplated by the applicable regulations.[10]

---

[10] Thus, the issue raised by the University in this Court, whether the district court improperly construed the Act to require the University to assume undue financial and administrative burdens by furnishing an interpreter for Camenisch, is not presented by this case, because the district court did not do so. To the contrary, the order entered was as non-intrusive as possible, requiring only that the University procure some "effective method of making orally delivered course materials available to Plaintiff. . . ." In the absence of a showing by the University that the state and private assistance HEW had found could be

Thus, the only legal question for this court to resolve is whether the regulations are valid, and this is a question which has nothing whatever to do with this Court's decision in Southeastern Community College v. Davis. As noted above, the regulations were authorized by Congress, in the 1974 Amendment to the Rehabilitation Act,[11] and

---

utilized was unavailable, or detailing the financial and administrative expense which the University will have to bear, the record would not support finding the district court's order burdensome or unreasonable.

[11] S. Rep. No. 93-1297, 93rd Cong., 2nd Sess., reprinted in 1974 U.S. Code Cong. & Ad. News at 6390. Congress further expressed the intent that the regulations be implemented by the end of 1974. Id. at 6391.

they were the result of a particularly careful and extensive rule-making process.[12] All of this, moreover, occurred pursuant to a specific Executive Order, directing the

---

[12] Over three hundred written comments were received in response to HEW's Notice of Intent to Issue Proposed Rules. 41 Fed. Reg. 20296 (May 17, 1976). The written comments were supplemented by a series of ten meetings conducted by HEW at various locations across the country. On July 16, 1976, the Department published a Notice of Proposed Rulemaking, analyzing the public comments received on the critical proposed regulation for further public comments. 41 Fed. Reg. 29549 (1976). A total of more than 850 comments were received and analyzed. An additional 22 public meetings were held after publication of the July 16 Notice, again designed to inform interested persons and organizations of the proposed regulations and to solicit their comments and recommendations. Transcripts of all these meetings were made and analyzed along with the written comments.

Department of Health, Education and Welfare to "coordinate the implementation of Section 504 by all federal departments and agencies, adopt rules and regulations and issue orders deemed necessary."[13]

As this court most recently held in Chrysler Corp. v. Brown, 441 U.S. 281 (1979) "properly promulgated, substantive agency regulations have the force and effect of law." See Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977); Foti v. Immigration and Naturalization Serv., 375 U.S. 217 (1963); United States v. Mersky, 361 U.S. 431, 437-38 (1960); Atchison, T & S.F.R. Co. v. Scarlett, 300 U.S. 471, 474

---

13 On numerous occasions this Court has determined that administrative interpretations of a statute by the enforcing agency are entitled to "great deference." E.g., Udall v. Tallman, 380 U.S. 1, 16 (1965); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

(1937). The University has not alleged that the regulations which decide this case fail in any of these regards. Instead, its position apparently is that a covered program would not violate the statute if each otherwise qualified handicapped individual were permitted to participate and required to provide any necessary accommodations at his own expense. But that is not how HEW has interpreted the statute through its regulatory authority, and unless its interpretation is contrary to the statute, it must be honored. In light of this Court's express recognition in Southeastern Community College that the statute forbids, in certain circumstances, the "refusal to accommodate the needs of a disabled person" without undue burden, 442 U.S. at 413, HEW was well within its

statutory authority in rejecting the University's proposed rule. As the Seventh Circuit observed in Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977) with regard to public transportation:

> There is no equality of treatment merely by providing the handicapped with the same facilities as ambulatory persons . . . ; for handicapped persons who cannot gain access to such facilities are effectively foreclosed from any meaningful public transportation. 548 F.2d at 1284.

Similarly in public education, to provide a handicapped student with the exact same facilities, and not make the reasonable adjustments that make the access meaningful, is to effectively foreclose him from education. Lau v. Nichols, 414 U.S. at 566 ("there is no equality of treatment merely by providing [non-English speaking]

students with the same facilities, textbooks, teachers, and curriculum. . . .").

The idea that identical treatment may constitute statutorily defined "unequality" thereby necessitating differential treatment as a remedy, has a long and distinguished history in this Court. As the Chief Justice wrote in Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), construing Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e,

> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has -- to resort again to the fable -- provided that the vessel in which the milk is proffered be one that all seekers can use.

See also Dennis v. United States, 339 U.S. 162, 184 (1950) (Frankfurter, J.,

dissenting) ["There is no greater inequality than the equal treatment of unequals."][14]

In a number of cases like that before this Court, lower courts have correctly found discriminatory and therefore illegal the arbitrary and unjustified refusal to make adjustments (which do not impose undue financial or administrative burdens) to provide otherwise qualified handicapped

---

[14] Providing both the rich and the poor the "opportunity" to rely on appellate transcripts has been deemed unequal treatment. Griffin v. Illinois, 351 U.S. 12 (1956). The University's argument here requires that the otherwise qualified handicapped accommodate themselves to its rules in precisely the manner which this Court has consistently held discriminatory.

persons the opportunity to participate in covered programs.[15] These decisions are consistent with Title VI cases which have required far more substantial changes in public schools and public housing than are at issue in this case.[16] And, as already noted, Title VI provides the model for enforcing Section 504.

---

[15] Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977) (adapting mass transit vehicles to accommodate mobility impaired persons); United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977) (adapting mass transit vehicles); Bartels v. Biernat, 427 F. Supp. 226 (E.D. Wisc. 1977) (mass transit vehicles); Hairston v. Drosick, 423 F. Supp. 180 (S.D. W. Va. 1976) (accommodate handicapped child in regular public classroom). Moreover the 1978 Amendments to the Rehabilitation Act authorize funds to assist federally-aided programs to accommodate the handicapped, 29 U.S.C. § 775(a)(1) (West. Supp. 1979).

[16] E.g. Hills v. Gautreaux, 425 U.S. 284 (1976); Lau v. Nichols, 414 U.S. 563 (1974); Bossier Parish School Board v. Lemon, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967).

III. PLAINTIFF HAS MET THE MODEST BURDEN SECTION 504 IMPOSES ON PLAINTIFFS OF SHOWING THAT THE UNIVERSITY'S PROGRAMS RECEIVE FEDERAL FUNDS

The University failed to argue below that § 504 did not apply to its actions in this case, and indeed coverage is so apparent that the failure is hardly surprising. As this Court's cases show, plaintiff met the modest burden § 504 imposes on him in this regard by establishing that the University receives significant federal funding. Even were the Court to doubt that the stipulated facts are sufficient, the failure of the University to identify which specific "program" is involved, and the general lack of a factual record on the specifics of federal funding, would counsel at most remand for development of the record. If the case is to be remanded, this

Court should instruct the courts below, in accord with ordinary principles of common law, that the University bears the burden of coming forward with evidence that the relevant program is not federally funded.

A. A Handicapped Student Suing A University Need Prove Only That the University Is A Recipient of Federal Funds in Order to State a Claim Under Section 504.

The "activity" in which the University of Texas is engaged is post-secondary education at the undergraduate and graduate levels.

The University of Texas receives at least $31,400,000 per year in federal financial assistance. The pervasive impact of this largesse is obvious. Without it, education and research at the University would be curtailed by more

than 15%. The stipulated figure almost certainly understates the degree of the University's reliance upon federal funding. There are no facts in the record to indicate whether that amount reflects various forms of federal financial assistance to students in the form of loans and education benefits which at least one court has held, correctly, are sufficient, without more, to require a University's compliance with Title VI and Section 504. Bob Jones University v. Johnson, 396 F. Supp. 597 (D.S.C. 1974), aff'd mem. 529 F.2d 514 (4th Cir. 1975). See also Grove City College v. Harris, Civ. No. 78-1293 (W.D. Pa. March, 1980). A review of the regulations promulgated pursuant to Section 504, and of that Section's legislative history,and well-established doctrine under the closely analogous

provisions of Title VI and the Revenue Sharing Act demonstrate that Section 504 should not be read to require plaintiffs to trace federal funds directly to a particular course in which they are enrolled.

The regulations promulgated under Section 504 and interpretations of analogous legislation demonstrate that "program specificity" is not a requirement for maintaining an action under Section 504. The University of Texas has stipulated that it receives considerable federal assistance, and it has never denied that this assistance permeates and supports -- in at least some measure -- all of its programs and operations in higher education and research. In recognition of the impossibility of reliably determining which state college classes are or

are not supported by federal assistance when the college itself is a recipient of such assistance, this Court has previously found that a college is bound by Section 504 upon a mere showing by a plaintiff that the college is "a state institution that receives federal funds." Southeastern Community College v. Davis, 442 U.S. at 400. Plaintiff Camenisch has more than satisfied this requirement here. The practical approach followed in Southeastern Community College is reflected in the HEW regulations implementing Section 504, which are directed not to individual lectures or classes or administrators of programs, but to recipients of federal funds, 34 C.F.R. Part 104.[17]

The clear Congressional intention to model Section 504 upon Title VI makes this point even clearer, because "program

---

17 See 34 CFR §104.44(d), quoted above at pp. 25-6.

specificity" is not a requirement in Title VI. The receipt of federal financial assistance in any form, including only direct loans or grants to students, triggers a requirement of compliance with all Title VI requirements and implementing regulations. Bob Jones University v. Johnson, 397 F. Supp. 596 (D.S.C. 1974), aff'd mem. 529 F.2d 514 (4th Cir. 1975). To hold otherwise in an analogous case to this under Title VI would be to say that the University of Texas could permissibly restrict some of its programs to white students only, if those programs received no direct federal assistance.

No court has ever required proof of program specificity in Section 504 or Title VI. The University's reliance on Trageser v. Libble Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979) and Carmi v. Metropolitan St. Louis Sewer Dist., 620

F.2d 762 (8th Cir.), cert. denied, _____ U.S. _____, 101 S.Ct. 249 (1980), is misplaced and misleading. The only issue decided in those cases is not present in this case -- whether employment discrimination is included within the scope of activities covered by Section 504.[18] Nor have private plaintiffs in Title VI actions been required to make such a showing.[19]

The broad interpretation given the

---

[18] The Fourth Circuit held in Trageser that employment discrimination was covered by a separate statutory provision under Titles V and VI. The court summarily distinguished Trageser from Southeastern Community College v. Davis: "That was not an employment discrimination case." 590 F.2d at 90 n. 12.

[19] The Title VI case cited by the University in support of its proposition,

(footnote continued)

phrase "program or activity" in analogous statutes prohibiting discrimination confirms this result. In regulations implementing the antidiscrimination provision of the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. §1242(a)(2)(A) (the "Revenue Sharing Act"),[20] for example, the Office of Revenue Sharing of the Department of the Treasury makes clear that, by virtue of that revenue sharing allocation, a Police Department as a whole is a "program or activity" subject to 31

(footnote continued)

Board of Public Institutions of Taylor County, Florida v. Finch, 414 F.2d 1068 (5th Cir. 1969), was a challenge to an administrative action by HEW terminating federal funds to a school district for violation of Title VI.

[20] 31 U.S.C. § 1242(a) prohibits discrimination under any program or activity of a "unit of local government" that receives revenue sharing funds.

U.S.C. § 1242(a)(1). Consequently, no particular subcategory of the Department may escape that provision through the exception in 31 U.S.C. § 1242(a)(2)(A):

> "Program or activity" means the operations of the agency or organizational unit of the government receiving or substantially benefiting from [revenue sharing] funds, e.g., a police department; department of corrections; health department.

31 C.F.R. § 51.51(i) (1979), reprinted in 2 Empl. Prac. Guide (CCH) ¶ 4855.51.[21]

These regulations and the broad interpretation courts have given the

---

[21] Prior to April 2, 1979, 31 C.F.R. § 57.51(7) read in relevant part as follows:

> "Program or activity" means any function conducted by an agency or department of the recipient government which government has received or is receiving [revenue sharing funds] ....

44 Fed. Reg. 19191 (April 2, 1979).

concept of program or activity in the context of these antidiscrimination provisions[22] should guide this court in rejecting the University's implausibly narrow reading of Section 504.

Under the University's theory, a cynical or recalcitrant recipient could funnel its federal funds to fairly administered projects and could use the non-federal funds made available by that federal allocation to engage in blatant discrimination elsewhere, without violating the Rehabilitation Act. Petitioners' restrictive reading of "program or activity" would subvert the Congressional decision

---

22 See e.g. United States v. Baltimore County, 19 FEP ¶ 403 (D. Md. Dec. 1, 1978).

to overcome discrimination based on handicap, and would indeed only encourage it by creating an incentive for making accounting and bookkeeping decisions based strictly upon issues relating to handicap. Congress plainly contemplated no such result.

B. The Stipulated Facts Concerning Federal Funding Suffice for Granting Camenisch the Relief Requested, And This Court Should Not Hold Otherwise Without First Remanding the Case for Development of a Factual Record

The issue of whether Section 504 applies only to the specific programs that receive federal aid was never raised, never pleaded as a defense, and never briefed or argued below. For the first time in the lengthy course of proceedings in which it has been engaged with the plaintiff Camenisch, the University of Texas has now asked this

Court to decide whether a plaintiff in litigation under Section 504 is required to prove that federal assistance was directly received by the particular program or activity against which he claimed discrimination or exclusion. Amici strongly believe that Section 504 embodies no such requirement. See Point IIIA, supra. However, if the Court should doubt that this is so, it still ought not to decide that there is a "program or activity" requirement on the basis of the record presented here. To do so would be both premature and ill-advised. Not only have there have been no findings of fact below on this issue; there have not even been moderately specific factual presentations or arguments by either party. Consequently, if the Court wishes to consider a possible

"program specificity" requirement under Section 504, it should do so only after remanding this case for further factual findings.

The essence of the University's newly-raised position is that, despite the clear mandate of the applicable regulations and a specific contrary finding by the federal agency charged with the duty of enforcing and interpreting Section 504, it was not required to provide the sign interpreter or other alternative ordered by the District Court because Camenisch did not prove he sought participation in a "program or activity" within the meaning of Section 504. But the University never objected on this basis in the district court or suggested that it might be grounds for a remand

in the Court of Appeals.

Moreover, even in its argument before this Court, the University has not alleged that there was no federal funding in Camenisch's program. In these circumstances, its rights under § 504 in this regard are not even arguably jeopardized. Compare Codd v. Velger, 429 U.S. 624, 627-28 (1977). Nor, in any event, has the University even attempted to define which of its "programs or activities" it thinks is involved -- or, rather, exempted. In short, the University has made no showing that the issue is relevant to the disposition of the case: it is purely hypothetical.

In addition, it is relevant here that the University signed an Assurance of Compliance Form with HEW agreeing to comply with the HEW Section 504 regulations in

all its programs.[23] Had the University believed the regulations went beyond the statute, it had administrative and judicial remedies to resolve that dispute. Having foregone these remedies, accepted the federal funds, and permitted handicapped persons like Camenisch to register for its courses in reliance on the broad protection of the Assurance of Compliance as signed, the University may not now be heard to escape from its contractual obligation as to such students,

---

23 The language of the Assurance is unambiguous. The University agreed to assure that "it will comply with Section 504 of the Rehabilitation Act and all requirements imposed by the applicable HEW regulations (45 C.F.R. Part 84)." The Assurance was given for valuable consideration, namely "any and all federal grants, loans, contracts . . . property, discounts or other federal financial assistance extended by the Department of Health Education and Welfare."

even if it could do so prospectively. See United States v. Caceres, 440 U.S. 741, 753 n. 15.

C. If Evidence Concerning A Particular "Program or Activity" Were Required Under Section 504, Ordinary Principles of Common Law Would Place The Burden of Coming Forward With Such Evidence Upon Defendants, Not Plaintiffs.

Even if the Court were to decide that a highly particularized finding must be made in Section 504 litigation whether the precise "program or activity" concerned directly benefitted from federal aid, the burden of supplying the evidentiary basis for such a finding must be with Section 504 defendants, not plaintiffs.

In civil contexts, courts retain the

power and responsibility to define and allocate the production and persuasion burdens. E.g. Castaneda v. Partida, 430 U.S. 482 (1977); Keyes v. School District No. 1, 413 U.S. 189 (1973); NLRB v. Great Dane Trailers, 388 U.S. 26 (1967). See generally, Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan. L. Rev. 5 (1959). Modern analysis has suggested that allocation of the burdens of proof is governed by three factors: (1) the degree of difficulty anticipated in proving the fact at issue; (2) the relative ease of access to the evidence; and (3) the direction of error displacement which the legal system wishes to affix to a given fact finding process. See e.g., Underwood, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal

Cases, 86 Yale L.J. 1299 (1977); McBaine, Burden of Proof: Degrees of Belief, 32 Cal. L. Rev. 242 (1944). Whether one approaches the burden of proof issue in this case from the perspective of difficulty of proof, relative ease of access to the evidence, or displacement of error, the burdens of proof should be borne by the defendants, after plaintiff meets an initial burden of coming forward to demonstrate that the institution receives federal assistance.

Federal financial assistance to colleges and universities like the University of Texas is pervasive, including research grants, construction funds and direct aid to the students themselves in the form of benefits (e.g. Veterans benefits) and loans. The University is the only party with routine access to the records of how

such federal assistance is received and how it is disbursed. Given the extensive involvement of federal funds in post-secondary education it is not unrealistic to presume that any particular program has received some federal financial assistance, at least in the form of government grants or loans to students enrolled.

Moreover, to the extent that error is to be displaced it should be displaced in the direction of ending discrimination against qualified handicapped individuals. Traditionally, our legal system has effected such a displacement of error by a sensitive allocation of the persuasion burden to favor deeply felt social goals.

Conclusion

For the foregoing reasons, the Court should hold that Section 504 of the

Rehabilitation Act of 1973 confers a private right of action, that the University of Texas has discriminated against respondent in the circumstances of this case, and that there is no requirement of program specificity under Section 504, or that that issue is not properly before the Court in this case.

Respectfully submitted,

GEORGE KANNAR
MARCIA ROBINSON LOWRY
(Counsel of Record)
American Civil Liberties
Union Foundation
Children's Rights Project
132 West 44th Street
New York, New York 10036
(212) 944-9800

ROBERT LEVY
New York Civil Liberties
Foundation
84 Fifth Avenue
New York, New York 10011
(212) 924-7800

Attorneys for Amici Curiae

Of Counsel:

PATRICIA E. HENNESSEY
CHARLES S. SIMS
American Civil Liberties Union
132 West 43rd Street
New York, NY 10036
KATHLEEN MEGIVERN
American Council of the Blind
1211 Connecticut Ave., N.W.
Suite 506
Washington, DC 20036
DIANA C. PULLIN
Center for Law and Education
6 Appian Way
Cambridge, MA 02138